No. 16-1454

IN THE
Supreme Court of the United States

OHIO, *et al.*,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CLEARING HOUSE ASSOCIATION L.L.C. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. Defining the Relevant Product Market in This Context Requires Recognizing the Two-Sided Nature of Payment Networks. 7

A. The Rule of Reason Requires the Factfinder to Weigh *All* of the Circumstances of a Case. 7

B. The Relevant Product Market Must Be Defined Based on the Commercial Realities Faced by Consumers. 9

C. Both Interrelated Sides of Credit Card (and Other Payment) Networks Must Be Taken into Account. 10

II. This Court Should Exercise Justified Caution in Imposing Antitrust Liability on Two-Sided Products. 14

TABLE OF CONTENTS—Continued

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Arizona v. *Maricopa Cty. Med. Soc'y*,
457 U.S. 332 (1982).....16

Atl. Richfield Co. v. *USA Petroleum Co.*,
495 U.S. 328 (1990).....8

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838 F.3d 179 (2d Cir. 2016).....13, 14

TABLE OF AUTHORITIES—Continued

Page

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Page

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INTERESTS OF *AMICUS CURIAE*[1]

The Clearing House, established in 1853, is the oldest banking association and payments company in the United States.

The Clearing House Association L.L.C. is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound, and competitive banking system that serves customers, communities, and economic growth. The Clearing House Association frequently participates as an *amicus* in cases that are important to the banking industry and financial sector.

Its affiliate, The Clearing House Payments Company L.L.C., which is regulated as a systemically important financial market utility, owns and operates payments technology infrastructure that provides safe, sound, and efficient payment, clearing, and settlement services to financial institutions. It also promotes innovation and thought leadership for the development of future generations of payments systems, products, and services. It presently clears and settles transactions worth approximately $1.7

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[1] The parties in this case have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

trillion every day, providing these services over its three traditional "industrial-strength" payment systems: (1) The Clearing House Interbank Payments System, a funds-transfer (wire) system; (2) the Electronic Payments Network, an automated clearing house network; and (3) the TCH Image Exchange Network, a check-image clearing house. It has also built and just launched a fourth payment system, the RTP® system—the first new payments system in 40 years—over which interbank transactions can be cleared and settled within seconds, with content-rich messaging, allowing all depository institutions and non-banks to develop new innovative payments products and services.

The Clearing House has a strong interest in this case. Each of the payment systems operated by The Clearing House Payments Company is a two-sided platform that must balance the competitive interests of participants on both sides (*i.e.*, payors and payees, and their respective financial institutions). The Clearing House respectfully submits this *amicus* brief to highlight the most important feature of the Second Circuit's correct analysis: it properly considered *both* sides of the particular two-sided market analyzed in this case. This economically appropriate approach has far-reaching consequences in numerous other two-sided payment platforms. A proper antitrust analysis of a two-sided market requires considering the competitive effects of both sides of that market, taken on balance. Otherwise, as this case potentially illustrates, one side of the platform (merchants) may lever potentially enormous antitrust liability against

the two-sided platform to extract benefits from the other side (cardholders). Such rent-seeking transfers threaten great harm both to two-sided markets themselves and to consumers. A correct antitrust analysis must therefore require a showing of net competitive harm, taking into account *both* sides of a two-sided market, lest consumers pay the costs of misdirected antitrust enforcement. For this reason, in particular, the decision of the court of appeals in this case should be affirmed.

SUMMARY OF ARGUMENT

This case asks the Court to reaffirm a fundamental and uncontroversial principle of antitrust law—that courts applying the rule of reason to complex and evolving markets must develop a practical understanding of the way firms compete in those markets. The Second Circuit's judgment should be affirmed because it accurately reflects the functioning of—and financial institutions' competition in—the payment systems, including those that The Clearing House has facilitated for over a century.

Specifically, this case requires the Court to apply the Sherman Act to the two-sided platforms that underlie the credit card and broader payment industries. As the lower courts recognized, the credit-card industry is of vital importance to the U.S. economy. Credit cards have become "a principal means by which consumers in the United States purchase goods and services from the nation's

millions of merchants." Pet. App. 73a-74a. Because of the size and convenience of these unique two-sided platforms, which provide simultaneous, interrelated benefits to participants on both sides—merchants and consumers—"the credit-card industry has generated untold efficiencies to travel, retail sales, and the purchase of goods and services by millions of United States consumers." *Id.* at 5a. The benefits to consumers of these two-sided payment platforms are undeniable and, accordingly, the number of transactions on these platforms has continued to grow. And, these benefits are of an even far greater magnitude when consideration is given to the overall payment ecosystem, which includes the multi-sided payment platforms operated by The Clearing House (and the Federal Reserve).

The unique characteristics of two-sided platforms—and their implications for antitrust policy—have attracted the attention of economists and scholars. Nevertheless, the concept of two-sided markets in economics is relatively new, and this case is one of the first to explicitly address them.

Given the importance of two-sided platforms, and their continuing evolution, this Court's deliberations should be grounded in competitive realities. It is precisely in these circumstances where this Court's antitrust precedents mandate that the judicial analysis under the rule of reason must consider all facts and circumstances and reflect the commercial realities facing consumers.

That is particularly true in regard to defining the relevant product market. A narrow view of the rule of reason and a one-sided definition of the relevant market in the context of two-sided platforms would ignore the inextricably interrelated effects from both sides of two-sided platforms that are necessary for such platforms to competitively succeed. Such a narrow focus would undermine the incentives of participants on both sides of the platform to support the overall network, ultimately harming consumers.

An "emerging consensus" is developing internationally that competition law should recognize the unique benefits that two-sided platforms provide to both consumers and merchants and make sure that antitrust analysis accounts for the competitive realities of both sides of two-sided platforms. As addressed by the Organisation for Economic Co-Operation and Development ("OECD"), this "emerging consensus" among the 35 nations that make up its membership, is that antitrust policy generally, and the standards for defining relevant product markets in particular, must take into account "the linkages between the two sides" of multi-sided platforms, and "the complexity of the interrelationships among customer groups."[2] OECD,

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[2] The OECD consists of 35 member countries representing most of the world's developed countries. Founded in 1961, it provides a forum for these countries' governments to discuss policies, share experiences, and solve complex problems internationally, including those arising from antitrust and competition law problems.

Two-Sided Markets 11 (Dec. 17, 2009), https://www.oecd.org/daf/competition/44445730.pdf. Or as the OECD put it more bluntly: "Mechanical market definition exercises that exclude one side usually lead to errors." *Ibid.*

This economically sound advice aligns with this Court's long-standing unwillingness to condemn unfamiliar practices, much less those with tangible consumer benefits. This Court has taken into account the federal courts' familiarity with a given economic arrangement—in this case, virtually none—when determining an appropriate antitrust liability regime for that type of arrangement. Likewise, this Court has recognized the importance of balancing the costs from both under- and over-inclusive theories of antitrust liability, along with the risks of sacrificing immediate consumer benefits to protect against speculative harms. Each of these economically sound principles counsels toward requiring a showing of competitive harm by antitrust plaintiffs claiming that two-sided arrangements are anticompetitive. At minimum, this showing should consider the competitive effects of the arrangement as a whole, including the real, tangible benefits to consumers from these two-sided platforms. If nothing else, economically sound antitrust analysis requires courts not to ignore easily demonstrable consumer benefits from a given practice. Just so here.

ARGUMENT

I. DEFINING THE RELEVANT PRODUCT MARKET IN THIS CONTEXT REQUIRES RECOGNIZING THE TWO-SIDED NATURE OF PAYMENT NETWORKS.

A. The Rule of Reason Requires the Factfinder to Weigh *All* of the Circumstances of a Case.

Both courts below examined the practices at issue in this case under the rule of reason, which "is the accepted standard for testing whether a practice restrains trade in violation of § 1" of the Sherman Act. *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885 (2007). The "design and function" of the rule of reason is to "distinguish[ ] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Id.* at 886.

This Court has long recognized that the line between restraints that harm competition and consumers and those that benefit them is often difficult to discern. See Part II, below. Courts must therefore take great care in applying the rule of reason, lest these restraints become the source of market distortion and consumer harm. See *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 327-28 (1961) (emphasizing that courts should conduct antitrust analysis so as to do "as little injury as possible to the interest of the general public").

That is particularly true where, as here, courts are asked to apply antitrust principles in complex markets to practices that have received little judicial or scholarly scrutiny. This Court's precedents make clear that when courts are asked to break new ground under the Sherman Act, they should favor judicial standards that permit the broadest consideration of facts and circumstances. See *Leegin*, 551 U.S. at 886 (noting that a *per se* rule "is appropriate only after courts have had considerable experience with the type of restraint at issue").

For these reasons, this Court has mandated that courts applying the rule of reason must "*weigh[ ] all of the circumstances of a case* in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Cont'l T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) (emphasis added). Consistent with this careful, expansive analysis, a plaintiff seeking to prove a violation of the rule of reason must show that the restraint is "*prima facie* anticomptetive." *Cal. Dental Ass'n* v. *FTC*, 526 U.S. 756, 771 (1999). As the court of appeals below explained, among other things, that requires the plaintiffs to show that "defendant's challenged behavior 'had an *actual* adverse effect on competition as a whole in the relevant market.'" Pet. App. 27a (citation omitted). See *Atl. Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 335-38 (1990) (discussing requirement of showing "antitrust injury").

B. The Relevant Product Market Must Be Defined Based on the Commercial Realities Faced by Consumers.

Each step of the rule of reason analysis requires consideration of all relevant facts and circumstances, and that includes the inquiry into the relevant product market. Indeed, this Court has emphasized that "*[t]he proper market definition * * * can be determined only after a factual inquiry into the 'commercial realities' faced by consumers.*" *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992) (emphasis added) (quoting *United States* v. *Grinnell Corp.*, 384 U.S. 563, 572 (1966)).

Frequently, the focus of the market-definition inquiry is on identifying products that are reasonable substitutes for each other. See, e.g., *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956); *Kodak*, 504 U.S. at 482; *United States* v. *Cont'l Can Co.*, 378 U.S. 441, 449 (1964). But consistent with the "all circumstances" analysis of the rule of reason as a whole, the inquiry into the relevant market is not so limited or rigid. Rather, it should include consideration of all facts relevant to the commercial realities faced by consumers. Thus, in *Grinnell*, the Court saw "no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities," whether or not the products were interchangeable. 384 U.S. at 567-68, 572.

So too here. The relevant product market in the context of two-sided networks must be defined by reference to the "commercial realties." And, central to those realities is the unique, two-sided nature of credit card and other payment networks.

C. Both Interrelated Sides of Credit Card (and Other Payment) Networks Must Be Taken into Account.

Credit card and other payment networks, like those operated by The Clearing House, are all paradigmatic examples of what economists refer to as "two-sided platforms." Payment networks bring together "two separate yet interrelated groups of customers who * * * rely on the platform to intermediate some type of interaction between them," Pet. App. 77a, allowing those on one side to pay for goods, and allowing those on the other side to sell goods and services with significantly mitigated default risk. The unique characteristics of payment two-sided markets, thus include:

- that there are two distinct groups of consumers who need each other in some way and who rely on the platform to intermediate transactions between them; the two-sided platform provides goods or services simultaneously to these two groups;

- that there are externalities across the groups of consumers, such that the value that customers on one side realize from the platform increases

with the number of customers on the other side—*e.g.*, the value to credit cardholders increases as more merchants join the network and the value to merchants increases as more cardholders join the network; and

- that the platform must design the price structure so as to induce both sides to join the platform and can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side.

See Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 Rand J. Econ. 645, 664-65 (2006) ("[A] market is two-sided if the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount; in other words, the price structure matters, and platforms must design it so as to bring both sides on board."); OECD, *Two-Sided Markets* 11 (describing elements of two-sided networks); David S. Evans & Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* 1-4, 8-9, 14-19 (Harv. Bus. Rev. Press 2016) (discussing essential characteristics of multisided platforms).

And as with two-sided markets more generally, the OECD's 2009 report provides important guidance for antitrust analysis of payment networks. There, the OECD explained—consistent with this Court's approach in defining relevant markets—that the need

to ensure that antitrust policies reflect the economic and commercial realities of such markets in order to avoid unintentionally harming pro-competitive and pro-consumer practices. See OECD, *Two-Sided Markets* 11, 23-25.

In particular, the OECD addressed the question of defining antitrust-relevant markets for two-sided products: "Given that two-sided markets involve two different sets of customers, a question arises as to how to treat the two sides when defining the relevant product market. Or to put it differently, there is the question of whether the two-sided market should be analyzed jointly or separately." *Id.* at 11. In answering that question, the OECD explained:

> There seems to be an emerging consensus that a precise relevant product market definition is less important than making sure the linkages between the two sides, and the complexity of the interrelationships among customer groups, are taken into account. *Mechanical market definition exercises that exclude one side usually lead to errors.*

Ibid. (emphasis added).

Indeed, the OECD's analysis tracks closely with that of the court of appeals in this case. "Typically," the OECD explained, "the analysis of market definition focuses on the effect of a price change on demand in a narrowly defined market." *Id.* at 24. But because "two-sided platforms have to coordinate

demand among two interdependent customer groups, a price change on one side of the market has positive feedback effects on the other sides of the market." *Ibid.* "Thus, the analysis must consider these feedback effects to determine the overall effect of a price change on profits." *Ibid.*; see also *id.* at 12 ("The price level, i.e., the sum of all prices, rather than individual prices or the price structure, is the appropriate means of measuring the competitiveness of a [two-sided] market and should be the focus of policy analysis."). Ignoring one side of a two-sided market may ultimately result in consumer harm by throwing off the delicate balance naturally achieved by platforms considering both sides.

The Second Circuit's analysis comported with the OECD's economically sound recommendations. That court cautioned that "[s]eparating the two markets here"—the two sides of a payment platform's market—"ignores the two markets' interdependence." *United States* v. *Am. Express Co.*, 838 F.3d 179, 198 (2d Cir. 2016). That separation would "allow[] legitimate competitive activities in the market for general purpose [card]s to be penalized no matter how output-expanding such activities may be." *Ibid.* It properly recognized the relationship between both sides of this two-sided market, noting that "the price charged to merchants necessarily affects cardholder demand." *Id.* at 200. Having properly articulated these cautions, the court properly cited the relationship between merchant charges, cardholder benefits, and increased quality and output in this particular two-sided market—and how these

increases are consistent with robust competition, rather than an anticompetitive practice. *Id.* at 205-06.

A similar analysis should apply to two-sided payment platforms outside of the credit-card context. While fundamentally different in rights and responsibilities of the parties and payment attributes, each of the payment systems operated by The Clearing House—i.e., for wire, check, ACH and real time transactions—are two-sided markets in which the competitive relationships between participants on both sides of the platforms are inextricably related, and the success of the platforms are dependent on properly aligning the incentives of all such participants. Otherwise, the volume of transactions over a specific platform could be insufficient to support the platform, and without both sets of participants, no transactions could be completed. As discussed next, these characteristics and incentives are driven by the economics of two-sided platforms.

II. THIS COURT SHOULD EXERCISE JUSTIFIED CAUTION IN IMPOSING ANTITRUST LIABILITY ON TWO-SIDED PRODUCTS.

Accounting for commercial and competitive realities is also consistent with this Court's approach in recent decades to focus on both the potential benefits and costs to consumer welfare arising from antitrust liability. This cost/benefit analysis is borne out in the Court's tailoring of antitrust analysis to specific arrangements that reflect both the federal

courts' familiarity with a given economic arrangement, *Broad. Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9-10 (1979), as well as the likelihood that the arrangement, on balance, harms competition. *Leegin*, 551 U.S. at 894-98. These concerns necessarily counsel great caution in applying antitrust law in the context of two-sided markets with which the federal courts are only now developing experience, especially in connection with financial and payment platforms, which benefit consumers greatly. See Geoffrey Manne, Joshua Wright & Todd Zywicki, *Politically-Mandated Credit Card Interchange Fees Won't Create Jobs (But They Will Hurt Consumers and the Economy)*, TRUTH ON THE MARKET (Mar. 20, 2010).[3]

This Court should hew to these time-tested principles in its guidance to lower courts in this case, and rigorously consider the error and transaction costs attendant to antitrust enforcement in generally benign contexts, as consumers—not merely litigants—ultimately bear these costs. See Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 21 (1984). Such an approach would be entirely consistent with the way this Court has proceeded over time in assessing the proper application of the antitrust laws and the need to account for competitive realities and the familiarity of the federal courts with such matters, most particularly how likely a given

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[3] Available at https://truthonthemarket.com/2010/03/20/politically-mandated-credit-card-interchange-fees-won%e2%80%99t-create-jobs-but-they-will-hurt-consumers-and-the-economy.

arrangement is to harm consumers after the benefits of antitrust liability *and* the costs, including error and litigation costs, are taken into account. See *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997).

Thus, at one end, this Court treats outright price-fixing and similarly obvious anticompetitive arrangements as *per se* illegal—illegal without requiring any empirical proof of competitive harm from the specific practice challenged. *Leegin*, 551 U.S. at 886. The federal courts have ample experience with the consequences of price-fixing, and both economic and empirical evidence confirms that price-fixing cartels lead to higher prices, slower innovation, and significant consumer harm both immediately and in the long run. See, e.g., *Arizona* v. *Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 348 (1982); *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963); Easterbrook, *supra*, at 3 & n.2.

At the other, this Court requires an antitrust plaintiff to make a specific threshold showing of a strong likelihood of consumer harm for arrangements that are theoretically capable of hurting consumers on balance, but practically unlikely to do so. *Cal. Dental Ass'n*, 526 U.S. at 771-78. "Predatory pricing" claims are a good example. See generally Phillip Areeda & Donald Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). Theoretical harm from price predation is certainly possible: it is possible that a hypothetical monopolist might lower its prices to drive rivals out of a market with high

barriers to entry, enabling that monopolist to extract monopoly rents afterward. But while this harm is theoretically possible, it proves deeply implausible in practice. Easterbrook, *supra*, at 26-28. Even when entered into in an attempt to drive rivals out of a market, most predatory pricing schemes fail in the long run, and immediate price cuts, whether as part of a predatory plan or otherwise, significantly benefit consumers in the short run. See Phillip Areeda & Donald Turner, *Scherer on Predatory Pricing: A Reply*, 89 HARV. L. REV. 891, 896-97 (1976). This Court and lower courts are therefore appropriately hesitant to sacrifice immediate consumer benefits to prevent speculative, far-off consumer harms.

This dual reliance on judicial familiarity with an arrangement as well as the typical consequences to consumers from such an arrangement reflect an appropriate consideration of the error costs of antitrust enforcement. *Broadcast Music*, 441 U.S. at 9 (judicial familiarity); *id.* at 22 & n.40 (consequences to consumers). See generally Easterbrook, *supra*. The error-cost framework, relied on in American antitrust law for decades—although apparently ignored by petitioners—rests on three common-sense (and economically sound) premises. First, there are two possible mistakes in antitrust enforcement, both carrying an attendant cost: the costs of failing to sanction a practice causing competitive harm (or a false negative), and the costs of sanctioning a pro-competitive practice that benefits consumers (or a false positive). *Id.* at 2. Second, false positives are more likely to harm consumers than false negatives,

because while both markets and courts can correct false negatives, only courts can correct false positives.[4] *Id.* at 2-3, 6-7; Joshua D. Wright, *Antitrust, Multi-Dimensional Competition, and Innovation: Do We Have An Antitrust-Relevant Theory of Competition Now?*, George Mason Law & Economics Research Paper No. 09-44, at 4 (Aug. 28, 2009).[5] Third, it is impossible to eliminate both types of errors because it is often difficult to distinguish between practices that promote competition and those that harm it. Easterbrook, *supra*, at 6.

Each of these premises underscores the importance of exercising significant caution when considering antitrust liability in two-sided markets.

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[4] This is due to both market forces as well as the nature of judicial review in the antitrust context. Easterbrook, *supra*, at 15. Market participants can, and often do, adapt to punish or weaken an anticompetitive arrangement that harms competition and consumers. *Ibid.* Likewise, courts develop familiarity with the likelihood of harm from a practice and, if given sufficient experience, often identify anticompetitive practices as such. *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 607-08 (1972). Yet antitrust enforcement against a harmless practice typically drives that practice from the market altogether. Easterbrook, *supra*, at 15-16. Market forces therefore cannot vindicate such a practice, and the comparatively limited use of that practice—partially a function of the steep penalties for violating the antitrust laws—coordinately reduces judicial exposure to it. *Id.* at 6-7. False positives therefore prove significantly more harmful to consumers than false negatives, all else being equal.

[5] Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1463732.

Id. at 7-9. Judicial experience with these arrangements is only now emerging: indeed, the term "two-sided market" was coined only in 2000, David Evans & Richard Schmalensee, ***Markets with Two-Sided Platforms***, in 1 ISSUES IN COMPETITION LAW AND POLICY 667, 668 (ABA Section of Antitrust Law 2008), and compared with most arrangements in antitrust, there is virtually no judicial analysis of the antitrust implications of economic arrangements involving these complex products. Moreover, the available scholarly analysis suggests that interventions into two-sided markets can lead to significant unexpected consequences for consumers and merchants alike. See Zhu Wang, Scarlett Schwartz & Neil Mitchell, ***The Impact of the Durbin Amendment on Merchants: A Survey Study***, 100 Fed. Res. Bank of Richmond Econ. Q. 183, 186 (2014).

The little experience that American policy has with intervening in two-sided payment markets suggests that caution is especially appropriate here. Debit cards, like credit cards, are two-sided payment markets; like credit cards, their interchange fees and corresponding rules seek to balance both sides of that market—merchants and consumers—through a product attractive to both. *Id.* at 185. In response to claims that these payment products raised prices on merchants excessively, the Durbin Amendment to the Dodd-Frank Act authorized the Federal Reserve to regulate these fees. *Id.* at 183-85. Advocates for the Durbin Amendment claimed that these price caps would ultimately benefit consumers through lower prices from merchants, *id.* at 185, even in the face of

evidence that interchange fees typically paid for benefits that consumers found highly desirable, such as free checking. See *ibid.*

The Durbin Amendment has not worked as expected. In 2011, the Federal Reserve capped debit interchange fees at roughly half of their average previous amounts. *Id.* at 184. Consumers soon lost many of the benefits that the previous interchange fee subsidized, such as free checking accounts, free debit cards, and debit cards reward programs. See, e.g., Harry C. Alford, *After 6 Years, Consequence of the Durbin Amendment Are Evident*, Forbes.com (Mar. 1, 2017 2:40 PM).[6] But the promised lower prices never materialized: as both economic analyses and consumer surveys reflect, most merchants did not lower prices and kept the benefits promised to consumers for themselves. Wang, Schwartz & Mitchell, *supra*, at 194-95, 197. Nor were the Durbin Amendment's price controls even uniformly beneficial to merchants—smaller merchants ultimately paid *more* in interchange fees, squeezing their narrow margins ever further. *Id.* at 184, 200-02, 205. The only apparent beneficiaries of this intervention were large-scale retailers, which received this legislative transfer at both consumers' and payment products' expense. *Id.* at 193-94; see also *The Durbin Amendment: A Failed Experiment*, American

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[6] Available at: https://www.forbes.com/sites/realspin/2017/03/01/after-6-years-consequences-of-the-durbin-amendment-are-evident.

Bankers Ass'n (Winter 2017).[7] This unfortunate experience is hardly one to emulate.

Indeed, as respondents highlighted during the certiorari stage, there has been no appellate analysis examining the Section 1 enforcement implications for two-sided credit card markets *anywhere* before the decision below. Br. for American Express in Opposition, at 13 (citing Br. for the United States in Opposition, at 19-20). Given this relative unfamiliarity, this Court ought err on the side of more circumspect antitrust enforcement—especially given that it can revisit that determination as judicial experience with these products grows. Easterbrook, *supra*, at 4-9.

Such an approach is also consistent with this Court's sensitivity to consumer benefits from economic arrangements when determining appropriate antitrust analyses. *Leegin*, 551 U.S. at 886. Here, that inquiry is particularly straightforward: both sides of a two-sided platform such as that at issue here significantly benefit consumers through fees from merchants that support points programs, cash rebates, and other desirable perks for consumers. See also Julian Morris, Geoffrey Manne, Ian Lee & Todd Zywicki, *Punishing Rewards: How clamping down on credit card interchange fees*

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[7] Available at: https://www.aba.com/Advocacy/Documents/Durbin%20Repeal%20Leave%20Behind%20Winter%202017.pdf (last visited, Jan. 18, 2018).

can hurt the middle class, Macdonald-Laurier Institute (Nov. 2017) (demonstrating mutual benefits of credit card markets).[8] Under this Court's longstanding precedent, an arrangement as the one here, which undisputedly benefits such consumers, immediately warrants a corresponding presumption that antitrust liability for that arrangement must be rigorously justified in the light of the net beneficial effects to consumers. Any antitrust analysis that deliberately excludes the acknowledged and demonstrable effects on consumers from a given arrangement merely heightens the costs of a false positive, and ultimately sacrifices immediate consumer benefits for speculative consumer harms.

Moreover, there is special reason to be cautious in assigning antitrust liability in the context of two-sided markets based on one side's purported economic harm. Two-sided markets by definition require the participation of both sides for the product to exist in the first place. That is what makes them two-sided. David Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 Colum. Bus. L. Rev. 667, 668 (2005). Unlike a traditional market, a two-sided market brings two economic constituencies together to create a product that both sides will use. This contrasts with normal markets, such as retail stores, which purchase their

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[8] Available at https://macdonaldlaurier.ca/files/pdf/MLI-PaymentCardRegulationPaper10-17web.pdf.

inventory from an upstream wholesaler and resell it to end consumers.

Accordingly, a two-sided platform must necessarily satisfy these two constituencies with economic interests that are frequently opposed. Evans & Noel, *supra*, at 682-84 (discussing examples). In the credit-card context, for example, merchants and consumers may have opposite short-term, individualized incentives regarding interchange fees: merchants directly or indirectly bear these fees, and thus may want to keep them as low as possible; cardholding consumers neither see nor bear them, but they consume the perks funded in part from these fees. *Id.* at 682. But merchants and cardholders alike enjoy robust, easily perceived benefits from two-sided credit markets. Morris, Manne, Lee & Zywicki, *supra*, at 7. Merchants need not bear the risks of default for purchases made on credit (which are borne by the card company vis-à-vis the merchants), and they can induce consumers who happen not to carry sufficient cash for a purchase to nonetheless buy an item immediately. See *ibid.* Conversely, along with the perks that many credit cards offer, these two-sided products offer consumers greater liquidity and enable them to smooth their consumption patterns over time—all precisely because these cards are two-sided products. *Ibid.*[9]

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[9] Similar mutual benefits arise from other two-sided payment platforms. For example, billers (payees) benefit when debtors (payors) timely pay for services, and incentives supported by

These benefits have accordingly driven significant growth in payment-card transactions—and this increased volume itself suggests a robust, competitive marketplace. *Id.* at 30.

These consumer benefits promote competition precisely because they are a cornerstone of payment-card competition in this two-sided market. Payment card networks compete for cardholders at numerous stages, both in seeking new cardholders and encouraging them to use their particular payment card.[10] Evans, *Two-Sided Market Definition*, *supra*, at 16. Each consumer purchase gives cardholders a new opportunity to pick among competing features and perks, including highly desired rewards and travel programs and cash back to the consumer. *Id.* at 9. And like all competition, this repeated competition for consumers drives down prices and encourages new, innovative products—leading to greater quantities of higher quality goods. *Id.* at 3,

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payees to incentivize prompt and accurate payments benefit payors by, for example, enhanced user experiences, diminished risks of fraud or misapplication of funds, or the incurring of late fees.

[10] Payment-card networks likewise compete in attracting merchants to their networks. This competition in part relies on the significant additional business that a payment card's customers can bring to a retailer. Merchants therefore have an incentive to free ride: count on a payment network to bring customers in, but discourage them from using a network's products at the point of sale. The continued operation of a two-sided market depends on the effective prevention of these and similar free-riding problems.

n.4, 6-9. These are hallmarks of a competitive market.

That a particular two-sided market may benefit one constituency more than the other in a particular way—even that it involves a cross-subsidy from one side (merchants) to the other (cardholders)—should be of no special economic significance, and should not be the basis for antitrust liability. Such cross-subsidies occur in many contexts and often benefit consumers and competition. See Evans & Noel, *supra*, at 684. Nor, for that matter, would any serious antitrust analysis aimed at maximizing total consumer welfare ignore the *consumer* side of any purported cross-subsidy. See, e.g., David Evans, *Two-Sided Market Definition*, ABA Section of Antitrust Law, 6 (Nov. 11, 2009).[11] Such a limited view would ignore the growing experience that courts have with these products and deliberately cast it aside. An economically sophisticated antitrust analysis is superior to a doctrinally simple one. Easterbrook, *supra*, at 39-40.

These common and tangible benefits to both sides of the two-sided market suggest that this Court should, at a minimum, require plaintiffs pressing antitrust claims against two-sided networks—particularly those with significant consumer benefits—to show that the arrangement causes competitive harm when taken *as a whole*. See Pet. App. 49a-50a. Undoubtedly, most participants in

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[11] Available at SSRN: https://ssrn.com/abstract=1396751.

two-sided markets desire a greater share of the surplus generated from these arrangements at the expense of the other constituencies. But an economic harm to competitors—or between parties to the same product—does not amount to a harm to competition. See generally Evans & Noel, *supra*. If petitioners raise a cognizable antitrust claim at all, courts should require an up-front showing of net competitive harm when considering the transaction as a whole before shifting the burden under the rule of reason and requiring an antitrust defendant to show that its conduct is justified by affording procompetitive benefits that outweigh any competitive restraints. Stated differently, the costs and burdens of defending against an antitrust claim premised on an incorrect analysis of commercial and competitive realities in the first instance, would itself impose social costs that the antitrust laws, and this Court's precedents, do not support.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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